(13)

Nos. 90-6588 and 90-1205

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JAKE AYERS, JR., *et al.*,
Petitioners,

v.

RAY MABUS, GOVERNOR,
STATE OF MISSISSIPPI, *et al.*,
Respondents.

UNITED STATES OF AMERICA,
Petitioner,

v.

RAY MABUS, GOVERNOR,
STATE OF MISSISSIPPI, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA IN SUPPORT OF RESPONDENTS, RAY MABUS, GOVERNOR, STATE OF MISSISSIPPI, *ET AL.*

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA

The Board of Trustees of The University of Alabama (hereinafter "University of Alabama" or the "University") respectfully moves for leave to file the attached brief amicus curiae in support of the respondents. The Solicitor General of the United States and counsel for the respondents have consented to the filing of the attached

brief. Counsel for private petitioners have refused to consent to the filing of the brief.

The University of Alabama is a party to litigation in Alabama involving several claims and issues similar to those raised in the case at bar. Trial has been completed and a decision is pending in *Knight v. State of Alabama*, No. CV-83-M-1676-S (N.D. Ala. filed July 7, 1983). In earlier appeals of that and related cases, the United States Court of Appeals for the Eleventh Circuit made certain rulings that were consistent with the decision of the Fifth Circuit in the case at bar. *United States v. Alabama*, 791 F.2d 1450 (11th Cir. 1986), *reh'g denied*, 796 F.2d 1476 (11th Cir.), *cert. denied sub nom., Board of Trustees v. Alabama Bd. of Educ.*, 479 U.S. 1085 (1987); *United States v. Alabama*, 828 F.2d 1532 (11th Cir. 1987), *cert. denied sub nom., Board of Trustees v. Auburn University*, 487 U.S. 1210 (1988).

In its petition for a writ of certiorari in the Mississippi case the United States described the Alabama litigation as "a similar higher education desegregation case" and cited its pendency as a reason for this Court to grant the petition. Petition of the United States for a Writ of Certiorari at 7 n.3, *United States v. Mabus*, No. 90-1205.

In the long course of the Alabama litigation the United States has changed its position on several issues central to higher education desegregation. The University of Alabama has an important historical perspective on the practical effect of attempts to apply these changing standards and others urged upon the Court by the private petitioners and certain of their supporting amici, to the realities of higher education.

More importantly, the University of Alabama has had experience with the issue of racial segregation and desegregation and certain issues of fact raised by the United States, the private petitioners and their supporting amici. The record in the Alabama litigation contains information on issues such as the history and contemporary status of traditionally black institutions, representation of blacks on faculties, and the government's flawed curriculum duplication analysis, which may be helpful to the Court in its deliberations.

For the foregoing reasons, the Board of Trustees of The University of Alabama submits that the attached brief provides an important perspective on relevant issues that differs from those of the parties. This Movant respectfully requests that its motion for leave to file a brief as amicus curiae be granted.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA IN SUPPORT OF RESPONDENTS, RAY MABUS, GOVERNOR, STATE OF MISSISSIPPI, *ET AL.*

INTEREST OF AMICUS CURIAE

The University of Alabama has some experience with the processes of racial desegregation that may be of assistance to the Court. Since the 1963 "stand in the schoolhouse door," the University has enrolled and grad-

uated thousands of black students, has become a national leader in the graduation of black students in engineering, and has for some time granted doctorates to black students at a rate far higher than the great majority of graduate institutions around the country. The three campuses of the University of Alabama System [1] enroll more black students than either of the two public historically black institutions in Alabama.

This Court's decision in the present case may have some effect on litigation to which the University is a party. Trial has been completed and post-trial pleadings and briefs have been submitted in the case of *Knight v. State of Alabama*, No. CV-83-M-1676-S in the United States District Court for the Northern District of Alabama. The United States, in its petition for a writ of certiorari in *United States v. Mabus*, No. 90-1205, describes the Alabama litigation as "a similar higher education desegregation case" and cites the possible impact of the Fifth Circuit decision on the Alabama case as a reason for granting the petition in *Mabus*. Brief of the United States in Support of its Petition for a Writ of Certiorari at 7 n.3, *United States v. Mabus*, No. 90-1205.

SUMMARY OF THE ARGUMENT

The Fifth Circuit correctly recognized the fundamental differences between elementary and secondary schools and institutions of higher education, and it appropriately applied the factual analyses and legal tests that govern higher education desegregation cases. That court's opinion is fully consistent with the holdings of the Eleventh Circuit and with the practical realities of modern American higher education.

The petitioners' basic theory of liability is premised upon an assertion of institutional interests rather than

[1] The University of Alabama (Tuscaloosa), The University of Alabama at Birmingham, and the University of Alabama in Huntsville.

on the protection of individual rights. Although the history, origin and contemporary role of black colleges and universities may generate an ongoing national debate, they have no causal connection to the question of current access to institutions such as the University of Alabama or the University of Mississippi.

Certain factual issues upon which the United States places great emphasis, such as program duplication between traditionally black and traditionally white institutions and relatively low number of blacks on institutional faculties, have no bearing on the real issues of desegregation. Each of the factual issues identified by the government as indicative of "remnants" of de jure segregation is in fact a phenomenon that is thoroughly national in scope, unconnected to the racial history of any given state or its institutions of higher education.

The United States has dramatically changed its position on central issues in the case, the most important of which is its newly articulated conviction that economic enhancement of historically black institutions is undesirable. Because of such changes, there are now substantial differences between the position of the United States, on the one hand, and the private petitioners and their supporting amici, on the other. These differences are the result of the impossibility of reconciling a legitimate inquiry into issues of equal access and equal opportunity with the agenda of institutional aggrandizement that has been a constant and recurring theme in the case at bar, the Alabama litigation and all similar litigation.

ARGUMENT

I. THE REALITIES OF DESEGREGATION IN HIGHER EDUCATION DIFFER FROM THOSE IN ELEMENTARY AND SECONDARY EDUCATION, AND THE LAW PROPERLY RECOGNIZES THOSE DIFFERENCES

The legal tests and factual analyses appropriate to the two educational strata—elementary/secondary education and higher education—have evolved from different origins and along different paths. The distinction was historically based on the fact that in the world of elementary and secondary schools, students could be compelled to attend and faculty assigned to work at specific schools. In higher education, neither compulsory attendance nor institutional assignment was available as a desegregation remedy.

Much of the United States' theory of liability and concept of remedy is based upon the inappropriate application of elementary and secondary school desegregation arguments to higher education cases. The United States and the private petitioners mistakenly assume that the Fifth Circuit's decision in the case at bar somehow dilutes the mandate of desegregation articulated in *Brown v. Board of Education*, 347 U.S. 483 (1954). In fact, as the Fifth Circuit clearly holds, the rights secured by the constitutional requirement of equal protection attach with full and equal force at all levels of education. It is only the mechanisms available to secure these rights that differ between elementary and secondary and higher education. A brief history of the ways in which this Court and others have recognized these differences may be helpful.

A. The Requirement for Desegregation in Higher Education Was the Antecedent for *Brown v. Board of Education*

Brown v. Board of Education was the culmination of the erosion of the doctrine of separate but equal. By

the time this Court fully overruled *Plessy v. Ferguson*, 163 U.S. 537 (1896), and held that racially segregated elementary and secondary schools were unconstitutional, it had repeatedly invalidated racial barriers to access in higher education. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, *reh'g denied*, 305 U.S. 580 (1938), *and reh'g denied*, 305 U.S. 676 (1939); *Sipuel v. University of Oklahoma*, 332 U.S. 631 (1948); *Sweatt v. Painter*, 339 U.S. 629 (1950); and *McLaurin v. Oklahoma State Regents for Higher Education*, 339 U.S. 637 (1950). Even in 1953 both the Court and the parties in *Brown* were well aware that the only surviving legacy of *Plessy*, which permitted the separation of young school children by race, was an anachronism.

In oral argument in *Brown*, counsel Thurgood Marshall urged this Court to extend the ruling in *McLaurin* to elementary and secondary schools, and "to make it explicit what they think was inevitably implicit in the *McLaurin* case, that the two [segregation and inequality] are together." *Argument: The Oral Argument Before the Supreme Court in Brown v. Board of Education of Topeka, 1952-55* 238 (Friedman ed., 1969) [hereinafter *Argument*]. His description of elementary and secondary school segregation as the last bastion of *Plessy* was a vivid portrait of its ironic and cruel effect on the life of black children:

> Those same kids in Virginia and South Carolina—and I have seen them do it—they play in the streets together, they play on their farms together, they go down the road together, they separate to go to school, they come out of school and play ball together. They have to be separated in school.
>
> There is some magic to it. You can have them voting together, you can have them not restricted because of law in the houses they live in. You can have them going to the same state university and the same

> college, but if they go to elementary and high school, the world will fall apart.

Argument at 239.

Thus, the view that the desegregation of higher education is a product of *Brown*, and that modern higher education desegregation cases are *Brown*'s progeny, is based on mistaken history. By 1954, higher education antecedents of *Brown* had already begun to toll the knell for the *Plessy* funeral. *Brown* was the final eulogy it so richly deserved.

B. The Mechanisms of Desegregation in Elementary and Secondary Schools Are Neither Available nor Appropriate in Colleges and Universities

The contrast between government control over access to and attendance at elementary and secondary schools and the voluntary student choice of college has been recognized by this Court and many other courts when deciding education desegregation issues. Early in the post-*Brown* era, in *Florida ex rel. Hawkins v. Board of Control*, 350 U.S. 413 (1956), the Court was quick to straighten out the misconception of the Supreme Court of Florida that some of the complexities and "deliberate speed" of *Brown v. Board of Education*, 349 U.S. 294 (1955), might be applied to delay the desegregation of a state-supported law school. The Court held that "decrees involving admission of blacks to graduate study [do not] present the problems of public elementary and secondary schools . . . . Thus, our second decision in the *Brown* case had no application to a case involving a Negro applying for admission to a state law school." *Hawkins*, 350 U.S. at 413-14.

The power to assign students to schools that they are compelled to attend has been the primary instrument of both segregation and desegregation of elementary and secondary schools. It is a power that does not exist in higher education. Indeed, the significance of this difference appears not only in the remedial stage; it is central

to any determination about liability. This distinction provided the basic premise of the decision of a three-judge panel in *Alabama State Teachers Association v. Alabama Public School and College Authority*, 289 F. Supp. 784 (M.D. Ala. 1968), *aff'd mem.*, 393 U.S. 400 (1969) [hereinafter *ASTA*]. In *ASTA*, the court denied a challenge to the establishment of a branch of Auburn University in proximity to Alabama State University (ASU, a historically black institution). It held that precisely because of the central role of student choice in college enrollment, many of the issues important in the elementary/secondary school context, such as the proximity of schools, did not provide the proper focus in higher education cases. Judge Frank M. Johnson, Jr. explained this difference as follows:

> Plaintiffs fail to take account of some significant differences between the elementary and secondary public schools and institutions of higher education and of some related differences concerning the role the courts should play in dismantling the dual systems. Public elementary and secondary schools are traditionally free and compulsory. Prior to "freedom of choice," children were assigned to their respective schools. This could be done with equanimity because, in principle at least, one school for a given grade level is substantially similar to another in terms of goals, facilities, course offerings, teacher training and salaries, and so forth. In this context, although reluctant to intervene, when the Constitution and mandates from the higher courts demanded it, we felt that desegregation could be accomplished, and that the requirements of the law would be met, without our being involved in a wide range of purely educational policy decisions. . . .
>
> Higher education is neither free nor compulsory. Students choose which, if any, institution they will attend. In making that choice they face the full range of diversity in goals, facilities, equipment,

course offerings, teacher training and salaries, and living arrangements, perhaps only to mention a few.

ASTA, 289 F. Supp. at 787-88.

The *ASTA* decision and its rationale were relied upon by the Fifth Circuit in the case at bar. *See Ayers v. Allain*, 914 F.2d 676, 683-684, 686, 687 (5th Cir. 1990).

II. THE NEW LEXICON OF RACE AND THE FUTURE SOUGHT FOR HISTORICALLY BLACK COLLEGES AND UNIVERSITIES

A. There Is no Common Vocabulary in Current Discussions of, and Litigation About, Race and Higher Education

One of the more difficult problems that litigants and courts have in cases such as the one at bar is understanding the new meanings of old terms. There was a time, not too long ago, when there was at least an agreed upon vocabulary in cases dealing with race and access to educational institutions. In the case at bar and in the Alabama litigation, however, there are several examples of how the traditional language and concepts of educational desegregation cases no longer convey clear meaning. For instance, during the course of these cases, "desegregation" has meant a variety of things to the United States, and it now appears to have entirely different connotations for the United States and for the private petitioners and some of their supporting amici. The difference is most acute when the goal of "desegregation" is sought for historically white colleges on the one hand and for historically black colleges on the other.

B. To Neoseparatists, Desegregation Means the Fulfillment of the "Promise" of *Plessy v. Ferguson*

In the Alabama litigation, the private plaintiffs, with whom the United States intervened under 42 U.S.C. § 2000h-2 (1981), have made it clear that their concept

of "desegregation" requires the continued black identity and control of historically black institutions. The essence of their demanded remedy is for these institutions to retain their historical mission in the black community and for the scope and scale of their facilities and programs to be enhanced to the level of creating black "flagship" institutions. The testimony of the Chair of the Board of Trustees of ASU could not be clearer on this goal:

> A. [T]he state of Alabama owes Alabama State everything it provided, everything it failed to provide Alabama State under the *Plessy versus Ferguson* doctrine, they owe us that now. There may be some redeeming value in *Plessy versus Ferguson*, we may be the first institution to get out of *Plessy versus Ferguson* today what the state of Alabama didn't give it yesterday, because if the state of Alabama had lived up to what *Plessy versus Ferguson* commanded, which was the law at that time, separate but equal, Alabama kept its separate, but if it had made it equal, then Alabama State would have a medical school, it would have a law school, it would have all of these professional schools that the University of Alabama now has. . . .
>
> Q. What should the state of Alabama do toward doing away with vestiges of desegregation [sic]?
>
> A. . . . Now, I don't think there is any question that the state of Alabama ought to bring Alabama State University and Alabama A&M University up to the standards and the status of the University of Alabama and Auburn. They ought to fulfil [sic] that mission and they ought to carry out the intent of *Plessy versus Ferguson*. They ought to do that.

Testimony of Dr. Joe Reed, 1/12/91, pgs. 134-136.

The United States has never clearly stated its position on this demand for the continued racial mission and identity of the historically black institutions. When pressed, it has recited the baffling mantra of the *Revised Criteria Specifying the Ingredients of Acceptable*

Plans to Desegregate State Systems of Public Higher Education, 43 Fed. Reg. 6658, 6660 (1978) [hereinafter *Revised Criteria*], that on the one hand such schools are the primary evidence of uneradicated vestiges of illegal segregation and on the other that nothing in the remedy must impair the historic mission of these institutions.

C. There Is an Improper Focus on Institutional Rights Rather Than on Individual Opportunities

The customary language and concepts established in earlier desegregation cases do not fit well in the case at bar or in the Alabama case, because the real objective of some of the plaintiffs and their amici has shifted away from the initial objective of securing access to institutions and protecting educational opportunities once access has been secured. Their primary objective has now become the protection of the institutions themselves and the maintenance of a racial identity for the historically black colleges and universities. Regardless of whether this is a legally permissible goal—and the Fifth Circuit held emphatically that it is not [2]—it is hardly a concept that squares with the customary definition of "desegregation."

Although the United States waffles by citing both antithetical imperatives of the *Revised Criteria* on this issue,

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[2] In rejecting the argument for HBCUs to maintain their historical identity, Judge Duhe, writing for the *en banc* majority, held:

> Institutional differences remain, but in order to level those differences under principles of equal protection this Court would somehow have to adopt the plaintiffs' terms "Black School" and "White School" and attach legal significance to those terms. This Court therefore cannot adjust the equities in the manner the plaintiffs request unless we declare, with the force of law, that [HBCUs] shall henceforth be designated as Black Schools for black students, and shall at all times remain equal in funding, offerings and facilities with their counterparts designated as White schools. We need not cite the source for this revolting principle.

Ayers, 914 F.2d at 692.

this Court is confronted head on with the issue by the amicus curiae brief of the National Bar Association, the National Association for Equal Opportunity in Higher Education, and the Congressional Black Caucus, which puts it in unambiguous terms. Theirs is a clear request for this Court to secure for historically black colleges and universities an enhanced, richer and racially identifiable future.

D. Neither the Fourteenth Amendment nor Title VI of the Civil Rights Act of 1964 Protects Institutional Interests

These same arguments advanced by the private petitioners and their supporting amici in the case at bar were also raised in an earlier stage of the Alabama litigation. When the Alabama case went to trial the first time (in 1985) the district court granted the motions of Alabama State University and Alabama A&M University to be realigned as plaintiffs. On the appeal of one aspect of that case, however, the Eleventh Circuit held that this realignment was improper because neither the Fourteenth Amendment nor Title VI protected these institutional rights. In an opinion by Judge Frank M. Johnson, Jr., the court held that Alabama State University could not satisfy the standing requirements to bring actions of this type. ASU, as a creature of the state, could not raise a Fourteenth Amendment claim under Section 1983. *United States v. State of Alabama*, 791 F.2d 1450 (11th Cir. 1986), *cert. denied sub nom., Board of Trustees v. Alabama Bd. of Educ.*, 479 U.S. 1085 (1987).

> Nothing in Title VI or its legislative history suggests that Congress conceived of a state instrumentality as a "person" with rights under this statute. . . . Absent any indication of Congressional intent to grant additional rights under this statute to non-private state subdivisions against the state itself, we decline to in[illegible] a right of action by judicial fiat.

Id. at 1456.

One of the principal arguments advanced by the "institutional" plaintiffs in the Alabama litigation was that they in fact served as representative advocates for the rights of their students, faculty and staff. The court considered and rejected that as an adequate basis for standing. In an interesting—but equally impermissible—twist on the concept of representative standing, the class of institution-supporting plaintiffs and amici are now attempting to use their personal standing as a vehicle through which to advance institutional claims.

E. Historically Black Colleges Are Neither Exclusively Southern Institutions nor the Major Educational Venues for Black Students

Black colleges and universities are a national, and not simply a Southern, phenomenon. Nor indeed, as this Court recognized in *Brown*, was racial segregation simply a regional phenomenon.

> Segregation in Boston public schools was eliminated in 1855. Mass. Acts 1855, c. 256. But elsewhere in the North segregation in public education has persisted in some communities until recent years. It is apparent that such segregation has long been a nationwide problem, not merely one of sectional concern.

Brown, 347 U.S. at 690 n.6. Until fairly recently, black students did not attend, in significant numbers, predominantly white colleges and universities in any part of the United States. As a result of this national exclusion, black colleges were established near black population centers. Although the majority of these schools were located in the South, because that is where most black people in America were living, it must be noted that the first of these institutions were set up in the Northern states. (*See* Appendix at 1a-2a.)

Historically black institutions at one time provided the college training for the vast majority of black students in the United States who went beyond secondary

school, but that is no longer the case. For example, only 40% of the black students enrolled in public four-year colleges in Alabama attend the two predominantly black institutions. Moreover, many of those attending these two schools and counting toward that 40% figure are from out of state.

III. FACTS ELICITED IN THE ALABAMA LITIGATION ARE RELEVANT TO THE COURT'S CONSIDERATION OF ISSUES RAISED IN THE CASE AT BAR

The United States and the private petitioners argue that vestiges (or "remnants") of segregation can be found in present day institutional characteristics, such as faculty composition and curricular offerings. The record developed in the Alabama litigation shows clearly that each of these characteristics is either a thoroughly national phenomenon (such as the low number of black faculty) or is based on such defective methodology as to be absolutely meaningless (such as the government's curriculum duplication analysis). A brief review of the record in the Alabama case on these issues, as well as on the government's reversal of position on institutional enhancement, may be of some relevance to the Court's determination of issues raised in the case at bar.

A. Underrepresentation of Blacks on College Faculties Is a National Issue

In both the Alabama and Mississippi cases, the private petitioners and the United States raised the issue of underrepresentation of blacks on the faculties of historically white institutions. The record is clear that there is fierce national competition among institutions of higher education and between academic institutions and other private and governmental employers for the relatively few potential black faculty members in the available labor pool. To the extent that any institution might appear to

have low numbers of black faculty, it is important for the Court to recognize the national dimensions of this issue and the relative economic power of Alabama and Mississippi institutions to compete.[3]

The immediate cause of the relative lack of black faculty members nationally has been the very low total numbers of blacks receiving terminal degrees in academic areas qualifying them for faculty appointments. According to the most recent data of the United States Department of Education, in the 1988-89 academic year only 2.8 percent of all doctorates awarded in the United States were awarded to blacks. Looking at specific institutions, the data show that in 1988-89, a total of 10 (or 7.9%) of the Ph.D.'s awarded by the University of Alabama (Tuscaloosa) went to blacks. In that same year Harvard awarded 9 doctoral degrees (or 2%) to blacks, MIT awarded 6 doctorates (or 1%) to blacks, the University of Minnesota awarded 1 black a doctoral degree, and the University of Wisconsin at Madison awarded only 8 out of 667 doctorates to blacks. (*See* Appendix at 4a.)

The paucity of black representation in doctoral programs is related to the underrepresentation of blacks in all levels of higher education. Dr. Bernard Sisken, an expert witness on behalf of the University of Alabama, testified in the Alabama litigation that approximately 80% of the disparity between black and white participation in higher education nationally can be attributed to economic factors. He found that because of the continuing, and in some respects increasing, gap between the economic status of whites and blacks in the United States, black students are confronted with far more difficult "opportunity costs" decisions in pursuing academic careers. This is particularly true for those faced with the choice of continuing their schooling to obtain a terminal degree. (*See* Appendix at 5a-6a.)

[3] National faculty salary data assembled by the American Association of University Professors show that public universities in Mississippi and Alabama are not able to compensate faculty with salaries that are competitive with those offered by the majority of similar institutions in the United States. (*See* Appendix at 3a.)

There is no question that far too few blacks are on the faculties of American colleges and universities. Their low representation, however, is a problem facing virtually every college and university in the country, and is in no way a remnant of the history of higher education in a few Southern states.

B. The Flaws in the "Elimination of Program Duplication" Argument

The United States has long argued that offering academic programs and courses with similar names at both predominantly white and predominantly black institutions has a segregative effect. Underlying the government's theory is its presumption (without any substantial supporting evidence) that undergraduate students are attracted to particular institutions primarily by the catalog descriptions of academic course offerings. In furtherance of this argument, in both the Alabama and Mississippi cases, the United States presented evidence in which it undertook to make academic program comparisons between predominantly white and predominantly black institutions. The same expert witness, Dr. Clifton Conrad, was responsible for both analyses and gave testimony in both cases. He used essentially the same methodology in both states. (*See* Appendix at 7a.) The United States' factual record on the issue of program duplication is almost exclusively based on Dr. Conrad's analysis and testimony.

In neither his Alabama nor Mississippi analysis did Dr. Conrad take into account any distinctions in institutional missions, course or program content, level of academic preparation of students, or any other substantive factors that might distinguish one institution or one aca-

demic program from another. He simply based his program duplication analysis on a comparison of course and program titles and program inventory codes. (*See* Appendix at 8a-10a.)

Moreover, Dr. Conrad's conclusions, which were based largely on a comparison of both "core" and "non-core" course offerings at different institutions, were virtually predetermined by the definition he used for each category and the courses he assigned to each. Conrad defined "core" academic programs as those that could be expected at any four-year college. "Non-core" programs were defined as those that were not an essential element of an institution's curriculum. Dr. Conrad then unilaterally made determinations about which courses were core and which were non-core. He categorized programs such as Portuguese and electron physics as "core" programs, while he slotted courses in education, business and engineering (which account for the major fields of 75% of American undergraduate students) into the "non-core" group. Hence, it was preordained that any college initially established as a teachers' college (which includes most comprehensive public institutions) would have high numbers of non-core programs. By excluding the highest demand programs from his categorization of "core" programs, Dr. Conrad assured a finding of significant program duplication among non-core programs offered by colleges of similar size.

In both Alabama and Mississippi, Dr. Conrad was careful not to attempt to validate his program duplication analysis by also comparing institutions that shared the same racial history. That is, he did not test his conclusion that the program duplication he identified between traditionally white institutions and historically black institutions was related to the differing racial histories. Had he done so, he would have discovered that his program duplication methodology would produce findings of large amounts of program duplication between most institutions

of comparable size, irrespective of their racial history or present racial composition. In Alabama, Dr. Conrad acknowledged that, had he made such a comparison, he would have found a great deal of program duplication between the two predominantly black schools. (*See* Appendix at 11a.) He also acknowledged that program duplication was endemic to higher education nationally. He could not identify any state which, when subject to his curricular duality analysis, would be shown to have a "unitary" system of higher education.

C. The United States Has Changed Its Position on the Segregative Effect of Facility and Funding Disparities

In the case at bar, the United States has completely reversed its position on the need for and permissibility of economic enhancement of historically black institutions in the desegregation process. The government now says that "[i]t would be the height of irony for the resounding mandate of *Brown* that separate schools are inherently unequal to be taken, 37 years later, as dictating a focus on whether funding of separate historically black and historically white schools is equal." Brief of the United States at 32 (citation omitted).

We agree.[4] But it is precisely this ironic outcome that the United States has advocated for the last decade in the Alabama litigation, and it is that same ironic focus that generated much of the government's evidence in the Mississippi and Louisiana cases. In furtherance of its enhancement demand in the Alabama case, the government offered the testimony of two principal witnesses: Dr. Larry Leslie in the field of institutional funding and

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[4] In the Alabama litigation, the University of Alabama warned of the resegregation that might result from demands to transform the historically black institutions into black "flagship" institutions offering essentially the same range of graduate and professional programs currently offered by the University of Alabama.

Dr. Harvey Kaiser on the issue of institutional facilities. Reading their testimony on behalf of the government, advocating enhancement of the HBCUs as a means to attract white students, reveals how complete a reversal in its position the government has made to arrive at its new recognition of the impropriety of enhancement. (*See* Appendix at 12a.)[5]

While the United States' belated recognition of the ironic consequence of institutional enhancement is welcomed, it stands in contrast to the continued demand by the private petitioners for institutional enrichment. There is now a great tension between the position taken by the United States on instituitonal enhancement and that taken by the private petitioners and their supporting amici. (*See* Appendix at 15a-16a.)

Furthermore, over time the government has clearly been of two minds on the issue of the continued racial identifiability of historically black colleges and universities. The long litany of executive orders, resolutions, and articulated positions taken by a series of national administrations on the future of HBCUs, as presented in the amicus brief of the National Bar Association, *et al.*, is ample evidence of the internal inconsistencies that have plagued the government in this and similar cases. It is difficult, if not impossible, to square the government's insistence that all institutions ought to lose their racial identity with its continued insistence that historically black colleges and universities have an important and legally permissible role in modern American higher education.

The fundamental changes in the government's position through the years in this case and in other states, and the substantial differences between the government's posi-

[5] Even the government's own experts agreed that a continuing racial mission for the HBCUs might impede their ability to recruit white students, regardless of enhancement efforts. (*See* Appendix at 13a-14a.)

tion and that of the private petitioners, serves only to illustrate the practical wisdom of the *ASTA* approach to higher education desegregation cases. Where institutional interests have been substituted for individual student rights as the focus of its case, it has become impossible for the United States to maintain a consistent, intelligible and effective position.

The results advocated by the petitioners in the case at bar and by the plaintiffs in the Alabama litigation provide a receipe for the resegregation of numerous institutions of higher education across the country. The Fifth Circuit saw clearly that it was being asked to validate, and indeed to require, the continued racial identifiability of the historically black colleges and universities in Mississippi. The consequence of requiring a state to maintain and enrich certain institutions because of their racial heritage would be to bind that state, its people, and those colleges inextricably to a past that they have long struggled to leave behind.

The University of Alabama is not so naive as to assume or to assert to the Court that it has somehow found full and satisfactory solutions to the many issues of race in colleges and universities. However, it has had a special, and even emblematic, role in the desegregation of higher education in America. It has also had some significant successes in the recruitment, enrollment and graduation of black students and in increasing the number of potential black faculty with terminal degrees in the national labor pool.

The Board of Trustees of the University of Alabama respectfully requests that this Court affirm the decision of the Fifth Circuit, and by so doing reaffirm the essential wisdom of *ASTA* that the proper inquiry in higher education desegregation cases is on the full protection of the rights of access and enjoyment of educational opportunities by all students, irrespective of race. As this

Court held long ago in *Hawkins*, the obligations of desegregation in higher education are both straightforward and immediate.

CONCLUSION

For the foregoing reasons, Amicus supports the Respondents' request that the decision of the Fifth Circuit be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

Testimony of Dr. James A. Anderson
Knight v. Alabama, No. CV-83-M-1676-S
(N.D. Ala. dated 11/29/90)

* * * *

[643] Cross Examination-Anderson

* * * *

A. The first black institutions actually develop[ed] in the northern states, Wilber Force [sic], [Cheyney] State, and Lincoln, so that the first black colleges actually developed in the northern states.

Q. Quakers developed some, around the Philadelphia area?

A. They developed [Cheyney] State. Wilber Force [sic] was developed by the African Methodist Episcopal church there, and so it's not that—that doesn't account for the development, that accounts for the distribution, and so there are fewer black colleges in the northern states than [644] the southern states, but the fact that there were fewer blacks in the north accounts more for the distribution, I think, than for the establishment.

Q. Okay. That's a fair distinction and I appreciate you making that. Nonetheless, the phenomenon of the black higher education institutions or indeed lower education institutions was [a] national rather than southern phenomenon?

A. Well, that needs to be qualified also. At that particular time we go to the lower educational systems like the common schools, and as I said in the 19th Century very few high schools. It was quite the practice in the north to have all black common schools as well.

Q. Yes, sir. I guess the point I'm trying to make is a sample [sic] and elementary one. We're talking about a national phenomena [sic] rather than regional phenomena, albeit there were far more of these kind of institutions in the south because of the population densities?

A. Yes. Now, we may be saying different things here, because I should find out what you are talking about when you say national phenomena? A phenomena, meaning what?

Q. Meaning the development of and maintenance of institutions principally enrolling black students.

A. Yes.

Q. In fact, many of the national institutions, including [645] the Armed Forces of the United States, the judiciary of the United States, many of our national institutions were racially segregated, or at least excluded black people or assigned black people particular positions on account of their race during much of the country's history?

A. Yes, that's true.

Q. In fact, the Armed Forces really did not attempt a genuine effort at thorough desegregation until the Korean conflict, is that not the case?

A. Yes, you're right. I think it was after Truman's executive order.

AAUP Faculty Salary Survey 1990-91

Compared to all Doctoral Universities

Percentage of Doctoral Universities in the United States that have higher average faculty salaries than the average faculty salaries at the institution shown.

	Professor	Associate Professor	Assistant Professor	Instructor
University of Mississippi	80-99%	80-99%	80-99%	80-99%
Mississippi State University	80-99%	80-99%	80-99%	80-99%
Southern Mississippi University	80-99%	80-99%	80-99%	80-99%
University of Alabama	60-79%	60-79%	60-79%	80-99%

Source: American Association of University Professors annual Faculty Salary Survey, published in *Academe*, March-April 1991.

Doctoral Degrees Awarded at Selected Institutions
1988/89

	Total Doctorates	Black Doctorates	Percent Black
University of Alabama	126	10	7.9%
*University of Arkansas	84	2	2.4%
University of California, Berkeley	838	19	2.3%
University of Chicago	310	8	2.6%
*University of Georgia	340	11	3.2%
Harvard University	461	9	2%
University of Illinois	647	10	1.5%
MIT	492	6	1%
University of Michigan	527	22	4.2%
University of Minnesota	543	1	<1%
*University of Missouri	236	3	1%
University of Mississippi	63	7	11.1%
University of Nebraska	236	6	2.5%
Northwestern University	358	10	3.6%
Ohio State University	608	23	3.7%
*University of Oklahoma	114	3	2.6%
University of Pennsylvania	414	8	1.9%
*University of South Carolina	169	7	4.1%
Stanford University	540	8	1.5%
**University of Tennessee, Knoxville	209	8	3.8%
University of Virginia	242	2	<1%
University of Wisconsin	667	8	1%
Yale University	317	4	1%

*Institutions in states which have been found by the Department of Education, Office for Civil Rights to have a "unitary" system of higher education

**Principal doctoral granting institution operated by the State of Tennessee, which appears as an Amicus supporting the United States in this appeal

Source: U.S. Department of Education, National Center for Education Statistics.

Testimony of Dr. Bernard Siskin
Knight v. Alabama, No. CV-83-M-1676-S
(N.D. Ala. dated 4/8/91)

* * * *

[95] Cross Examination-Siskin

Q. Now, again, Doctor, when you refer to 1107, and these are people that have got the Ph.D's, this is not a field of people who are potential, who are seeking university employment, or is it?

A. No, it's not, but there are studies done to the effect of that on the race. In other words, giving you the Ph.D., how likely are you to go into and seek a position in industry as opposed to academia and studies have shown that blacks are less likely to seek positions in academia with Ph.D's than are white. So that should work the reverse in this data set, that should actually lower the black expectant.

[113] Cross Examination-Siskin

A. There are a couple of things which makes me think about the impact, particularly at the Ph.D. level, okay? . . .

Most of the studies that have been done that I have seen, I just played with some numbers in the last data base, the Conference on Minorities in Education Studies show that the major reason for under utilization for blacks in colleges, high school, and furthermore at the universities, Ph.D. levels, is an income problem. In the mid 80's in the data, in some studies I have done in the [114] mid 80's, 80 percent of the disparity in college, at least 80 percent of the disparity in college participation between blacks and whites can be accounted for because of income differentials between blacks and whites. When you control for income disparities, it accounts for—Almost 80 percent of the overall disparities from blacks and whites is accountable by income differences, black and whites, and the income gap in this country is substantial between blacks and whites and that's everywhere, un-

fortunately, in this country. . . . The choice to get a Ph.D. is heavily influenced by your income since there is a big income trade off, lifetime trade off, income characteristics, and the probability of getting a Ph.D. is highly related to the income of the family. All of those factors mitigate heavily against the black population because of the poverty situation and the black situation in this country. Those factors appear to me from everything I have seen overwhelmingly more significant in impact. If it was really simply a result [115] of segregation, then you would expect to see vast regional differences in representation of blacks in colleges, and universities, and Ph.D. programs. You don't see that.

Testimony of Dr. Clifton Conrad
Knight v. Alabama, No. CV-83-M-1676-S
(N.D. Ala. dated 12/19/90)

Re-Cross Examination-Conrad

[625]

Q. Very briefly, Doctor, very, very briefly. You testified that you have conducted similar, albeit not identical, analyses in Mississippi and Louisiana of curricular duplication and program quality. Is that correct?

A. Yes.

Testimony of Dr. Clifton Conrad
Knight v. Alabama, No. CV-83-M-1676-S
(Deposition taken on 9/19/90 in Birmingham, Ala.)

[76]

Q. Did you make any analysis beyond the CIP code categorization to find out really what was the substance of the courses offered within particular programs? By that, I mean did you look at course syllabi or the particular pedagogical bent of a department in an institution?

A. No.

Knight v. Alabama, No. CV-83-M-1676-S
(N.D. Ala. dated 12/18/90 and 12/19/90)

Cross Examination-Conrad

[338]

Q. You used also the concept of service area in your direct examination. As we go through your reports, we'll talk about it in more detail. But did you make any analysis of where particular institutions in Alabama draw their students from, and if so, did that play any role in your duplication analysis?

A. As I have testified before, I haven't, including at my deposition.

* * * *

[342]

Q. Did you evaluate the extent to which any institutions in Alabama may have such a correlative with race in terms of their future mission, their present status, and their history, and to see whether or not that had an impact on student choice?

A. I have not systematically looked at that question.

* * * *

[352]

Q. As a follow up to another question I asked you about service areas, my presumption is, is that in addition to not taking into account a source within Alabama of an institution's students, you did not take into account the number of students who come to an institution from out of state in making any of your analyses?

A. I didn't, other than having a kind of general awareness that some institutions drew more heavily from out of state.

* * * *

[390]

Q. Did you, in your coming up with a definition of core programs, were you at all influenced by levels of student demand for particular programs?

A. In terms of what is core?

Q. Yes.

A. No, no.

* * * *

[393]

Q. Do I understand you to say that you undertook no test or made no analysis to see if it might be some factor other than a particular racial history which has resulted in the present way institutions look in Alabama; you have controlled for no other factor?

A. . . . I have certainly not, as you can tell in the text, introduced controls with regard to institutional type.

* * * *

[414-415]

Q. . . . But is it accurate for me to say, is it not, Doctor, that your use of student quality data, pardon me, student ability data was used in your institutional quality analysis, but not in any sort of institutional mission differentiation analysis?

A. That's correct. I think a better word would be student achievement as opposed to student quality. I wish I had used it.

Q. Student achievement levels?
A. Uh-huh.
Q. Yes, sir. Do you know or did you combine with your student analysis any sort of understanding of admissions criteria applied by the institutions you studied here?
A. No.

* * * *

[472]

Q. . . . Particularly in the area of faculty quality, where you have evaluated terminal degrees and the source of the terminal degrees, and in the related area of faculty research productivity. When you make those comparisons in Alabama, to what extent, if any, did you take into account different institutional emphases and reward systems?
A. I didn't.

Testimony of Dr. Clifton Conrad
Knight v. Alabama, No. CV-83-M-1676-S
(N.D. Ala. dated 12/18/90)

[388] Conrad

Q. Could I not substitute for your historically black schools, the two here, could I not substitute essentially any two schools in the right column other than the two flagships, I'm saying Auburn and University of Alabama main campus now, and essentially arrive at the same conclusion?
A. I don't know, that would be conjecture, but I would speculate, if you'd like me to that, you would find a fair amount of, substantial amount of duplication, because you have got a lot of duplication in the state between and among your white institutions. There is no mistake about that. In fact, to pick up an earlier point, you could do a study with all sort of comparisons and depending on who you're comparing, you might find more dual systems than unitary systems. And so what?

Testimony of Dr. Larry Leslie
Knight v. Alabama, No. CV-83-M-1676-S
(N.D. Ala. dated 10/31/90)

[98] Cross Examination-Leslie

Q. Dr. Leslie, does this funding pattern, [which historically resulted in unequal funding for HBCUs] affect the ability of the African American schools to attract white students?

A. Very definitely, yes.

Testimony of Dr. Harvey Kaiser
Knight v. Alabama, No. CV-83-M-1676-S
(N.D. Ala. dated 11/6/90)

[282] Cross Examination-Kaiser

Q. In order to attract white students, do the TBI's have to be the most attractive institution in the state?

A. I think I talked earlier about it's more important, the appearance and attractiveness of the TBI's are more important to attract other race students than the black students attending the TWI's.

Testimony of Dr. Larry Leslie
Knight v. Alabama, No. CV-83-M-1676-S
(N.D. Ala. dated 11/1/90)

[382] Cross Examination-Leslie

Q. Okay. Dr. Leslie, do you see a conflict between your conclusion that the funding available to the [PBI's] affects their ability to attract white students and a mission of those institutions to remain a black institution controlled by black individuals?

A. I think there is a potential difficulty there. I don't know that there is necessarily a difficulty, but there certainly is a potential.

Q. At least in theory, in your approach to that, there is a conflict, there could be a conflict in those different objectives?

A. It would depend upon degree, I suppose, of, yes.

Testimony of Dr. Harvey Kaiser
Knight v. Alabama, No. CV-83-M-1676-S
(N.D. Ala. dated 11/6/90)

[150] Cross Examination-Kaiser

Q. I would expect that especially in discussing other race students, the commitment of the institution to recruiting other race students would have an impact on its ability to attract those other race students?

A. Yes. . . .

Q. The efforts of an institution to maintain its image as a predominantly black institution, for instance, might affect its attractiveness to other race students, to white students?

[151]

A. Yes, it could.

Testimony of Dr. Clifton Conrad
Knight v. Alabama, No. CV-83-M-1676-S
(N.D. Ala. dated 12/18/90)

[342] Cross Examination-Conrad

Q. . . . If an institution was to have an articulated mission involving its race, the race of its community members and the racial orientation of its history, would that be a factor which might tend to influence student choice?

A. Yes.

Testimony of Dr. Aldon Morris
Knight v. Alabama, No. CV-83-M-1676-S
(N.D. Ala. dated 12/5/90)

[Dr. Morris appeared as an expert witness on behalf of the private plaintiffs, A&M and ASU.]

* * * *

[121] Direct-Morris

Q. And I think, I'm sure both Auburn and University of Alabama, there may be some debate between themselves, but I expect both of them would consider themselves flagship institutions. Let me ask you this: What would it take to make Alabama State or Alabama A&M a flagship institution?

A. The same thing that it takes to make any institution a flagship institution. Millions of dollars that is spent, that is spent on attracting some of the most distinguished [122] faculty from throughout the land, and I mean nationally and internationally. That is one very important thing that it would take.

It would take having the resources necessary to build the kind of computer system that is now needed in a university, high powered computer systems and laboratories of computers and so on that other people can use and be trained on.

It would take an administration and a leadership whose goal it was to make it happen and who had the resources to make it happen. So that—and it would also take a particular kind of attitude, these are so-called flagship institutions.

I function in a number of them now. They are able to go to the state and say hey, look, you know, we're one of the best in the country and therefore we're an asset to this state and you have got to come up with the resources and so on, so it also has to do with this kind of notion that we are good. We are leaders in this field and everybody else should see us that way and provide the resources to make the function true.

Q. Would that make the university attractive to all students, black, white and any and everything else racial wise?

A. If you built a Harvard or Yale, a Berkeley, a [123] University of Wisconsin, in Montgomery at Alabama State, it's like the old story about if you write a better book, or if you build a better mouse trap, that folks will make a beating path to your door step. That's what would happen. And you would have large numbers . . . of white students coming in, the notion is if you build it, the people will come.